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• IN THIS ISSUE •

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• The Use of Confidentiality Agreements in Family Law •

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Often in family law cases, clients want to protect their information and do not want to make it available to their former spouse, who may either directly or inadvertently disclose that information to third parties or to the general public. Many clients are surprised when they come to the family law process and learn that it is standard practice to provide complete disclosure of documents such as tax returns, social insurance numbers, corporate financial statements, and employment contracts. For those who are focused on privacy, it is often even worse to learn that all of this information may be filed with the court and that all documents filed with the court are available to the public.

Despite the best efforts of family law counsel, the protection of client information will not always be possible particularly where there is an ongoing proceeding. In all court proceedings, there is a tension between the privacy rights of individual litigants and the public's right to access the court system and right to information. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* has made it clear that a

Continued on Page 90

confidentiality order will only be granted where there is a serious risk to an important interest and that the benefits of the sealing order must outweigh the limits, including the public interest in open and accessible court proceedings.[1] These principles are equally applied to family law matters as they are to civil/commercial cases. There are no special protections for family law clients.[2]

In addition to the usual issues with the public's right to information filed with the court, there is good reason to insist on early, voluntary, and complete disclosure in family matters: it facilitates resolution.[3] If one party has not provided sufficient information, resolution of the dispute is typically not possible. Confidentiality agreements may be used in private negotiations or sought by way of order from the court as a way of facilitating disclosure. They can provide some protection for the disclosing party and act as a disincentive for the recipient party to freely use that information outside of the context of the family law dispute.

Confidentiality agreements are most commonly used to protect financial information of one of the parties or the financial information of a third party who has provided information that may be relevant to the parties' dispute. As an example, the spouse disclosing information (the "disclosing spouse") may argue that production of financial disclosure relating to that spouse's business would be harmful to the business because the spouse receiving documents (the "recipient spouse") may either provide this information to competitors or file it with the court where it would then become publicly available. It is sometimes argued by the recipient spouse's counsel that the recipient would not do anything to jeopardize the disclosing spouse's business interests, particularly if the disclosing spouse is paying the recipient spouse's support, because that may threaten the source of the support. This is often cold comfort to the disclosing spouse in family cases where emotions run high and there is little trust between the parties. Even where the recipient spouse does not have any intention of harming the disclosing spouse's business, this may happen if sensitive information is filed with the court and becomes publicly available.

There may be other reasons why a party to a family law dispute wants confidentiality. Sometimes details of the relationship itself or information about the relationship breakdown must remain confidential because one of the parties has a public profile, for example, and needs to have that information protected to ensure protection of his or her reputation.

This article explores the question of when confidentiality agreements may be obtained as well as the limits of these types of agreements. Before discussing the issue of when a confidentiality agreement may be necessary, it is useful to review the other protections that are available: the deemed undertaking rule, sealing orders, and publication bans.

The Deemed Undertaking Rule

The deemed undertaking rule is enshrined in Rule 30.1.01 of the Rules of Civil Procedure ("RCP") and subrules 20(24), (25) and (26) of the Family Law Rules ("FLR").[4]

Rule 30.1.01(3) of the RCP states:

> All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

It is important to note that there are limits to this rule:

> (4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11(8) (subsequent action).

The FLR contain similar provisions in Rule 20:

OBLIGATION TO KEEP INFORMATION CONFIDENTIAL

(24) When a party obtains evidence under this rule, rule 13 (financial disclosure) or rule 19 (document disclosure), the party and the party's lawyer may use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained, subject to the exceptions in subrule (25).

USE OF INFORMATION PERMITTED

(25) Evidence and any information obtained from it may be used for other purposes,

(a) if the person who gave the evidence consents;

(b) if the evidence is filed with the court, given at a hearing or referred to at a hearing;

(c) to impeach the testimony of a witness in another case; or

(d) in a later case between the same parties or their successors, if the case in which the evidence was obtained was withdrawn or dismissed.

COURT MAY LIFT OBLIGATION OF CONFIDENTIALITY

(26) The court may, on motion, give a party permission to disclose evidence or information obtained from it if the interests of justice outweigh any harm that would result to the party who provided the evidence.

Limits of the Deemed Undertaking Rule

The deemed undertaking rule is designed to facilitate disclosure: if litigants are assured that documents and answers will not be used for collateral or ulterior purposes, they will be encouraged to provide a more complete and candid discovery. The rule serves a public interest in getting at the truth, while at the same time offering privacy protection for litigants.[5] It encompasses a duty of confidentiality over documents produced under "compulsion".[6] Only documents that are required to be provided will be offered protection. If a party voluntarily provides disclosure, it is not covered by the same protection of the deemed undertaking rule.

The deemed undertaking rule, as codified in the FLR and RCP, developed as a common law principle and is treated as an undertaking to the court. The court therefore retains oversight over compliance with the rule.[7] Even though there is oversight of the court, there is no obligation which requires parties seeking to use one of the exceptions to seek permission before relying on the exception. For example, to employ the "impeachment" exception, it is not necessary to first seek direction from the court.[8] In the RCP, the court's overriding discretion is found in the words "does not prohibit". The FLR contains similar language in providing that the evidence/information "may" be used for other purposes. It is possible to seek an order for the court which would allow a further exception of the rule.[9]

Breach of the deemed undertaking rule may be considered contempt of court and may subject the party in breach to other remedies.[10] The deemed undertaking rule does not cover documents that are filed in court in the course of a proceeding. If either party in a family dispute files information or documentation obtained from the other party on a tem-

porary motion or at trial, the deemed undertaking rule does not apply, and all confidentiality is lost.

Sealing Orders and Publication Bans

A court may order that any document filed in a proceeding, including the entirety of the court file, be treated as confidential, sealed, and not form part of the public record.[11] In *Sierra Club*, the Supreme Court of Canada reviewed the law on publication bans and confidentiality orders[12] and made clear that the analytical approach used to determine whether a confidentiality order may be granted should echo the underlying principles of *Dagenais v. Canadian Broadcasting Corp*.[13] A confidentiality order will be granted when:

> (a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the confidentiality order, including the effects on the rights of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[14]

First Limb of the *Sierra Club* Test

Sealing orders are the exception and not the rule.[15] The first part of the test in *Sierra Club* states that there must be risk to "an important interest" including a "commercial interest". In order to succeed under this part of the test, the interest must be of public importance.[16] Protection of an individual's sensitive information to protect him/her from personal distress and embarrassment will not typically satisfy the test.[17] Mere economic harm alone is also not sufficient to override the openness principle.[18] It is not necessary for an applicant to demonstrate actual harm under the first part of the test, but the party must provide, with some specificity, evidence of possible harm or damage.[19] Broad statements that there are sensitive and private business matters at issue will not suffice.[20]

In *Himel v. Greenberg*, portions of the court file were sealed where exposure of commercial information would have breached confidentiality provisions in a shareholder agreement. This was deemed to be of public importance because society as a whole has an interest in the enforcement of commercial confidentiality agreements as opposed to just the party seeking the order.[21]

Second Limb of the *Sierra Club* Test

The court will only go on to consider the second part of the test if the first part is satisfied. The party seeking the sealing order must demonstrate that the potential harm outweighs the limits to be placed on openness.

As stated above, in *Himel*, a partial sealing order was granted. In balancing the salutary and deleterious effects of a sealing order, the court considered that the third party corporation that was not a party to the dispute was nevertheless being asked to produce disclosure as a result of its shareholders' "marital troubles" — this was a factor in considering the second balancing stage of the *Sierra Club* test.[22]

In considering the test for sealing orders, the protection of children may outweigh the public interest of openness. Section 70 of the *Children's Law Reform Act* allows a court to make a sealing order or publication ban and provides additional factors for the court to consider in making such an order.[23] Sealing orders may be granted where the best interests of the child are such that the information cannot be made available to the public.[24] The court must balance the public interest in openness, which fosters the integrity of the court system, against the protection of children who are the subject-matter of legal proceedings, which

has been characterized as a "social value of superordinate importance".[25]

Despite the importance of protecting children's best interests in family law proceedings, sealing orders are not routinely granted to protect these interests.[26] Even in a case where there is a real risk of harm to the child, the court may not grant a complete sealing order but will instead seal only part of the file which is absolutely necessary.[27] Most commonly, a sealing order will be refused and instead a publication ban will be ordered because it is less intrusive.[28] A publication ban still allows free access to the file but typically disallows identifying features of the case to be published, such as children's and parties' names, dates of birth, *etc*.[29]

Even in cases where the parties consent to a sealing order, the court may nevertheless refuse to make the order.[30] Before seeking a sealing order, litigants are required to first give notice to the media so that there is an opportunity to oppose the motion.[31] This ensures the public's right to openness is being protected but is often frustrating to family law clients since giving notice to the media may draw attention to a file which may otherwise not receive any attention.

Are There Other Ways to Protect Confidential Information?

Alternative Dispute Resolution ("ADR") processes continue to grow in popularity in part because they are confidential. There are however limits to confidentiality in ADR. As an example, if either party appeals an arbitral award, the underlying documents in the arbitration may then be filed with the court. In addition, it may be possible in some circumstances, for documents produced in mediation to be used in future litigation.[32] If either party refuses to agree to an ADR process, there may not be an option but to litigate the issues.

If the deemed undertaking rule is not sufficient to protect the client's information and the need for confidentiality does not meet the high threshold of sealing orders, a confidentiality agreement may be useful.

It is common for parties to agree on terms of confidentiality for the production of certain information. The parties could voluntarily sign a confidentiality agreement either during the disclosure process and/or at the end of the process when they are signing a separation agreement as extra protection to ensure the information disclosed in the course of negotiation may not be disclosed.[33]

If the parties cannot agree, or if the information is coming from a third party who will not agree to produce disclosure, a motion may be brought to seek an order for a confidentiality agreement. As is further explained below, the test for a confidentiality agreement is not as stringent as a sealing order, but there are requirements, and confidentiality agreements will not always be granted. A summary of some of the cases where courts have considered confidentiality agreements demonstrates that there are clear limits as to what information will be protected by the court.

Confidentiality Agreements — What is the Test and What Information Can be Protected?

An order requiring parties to enter into a confidentiality agreement is exceptional.[34] A confidentiality agreement may be a reasonable alternative to a sealing order and may be ordered where a party cannot meet the high threshold for a sealing order.[35]

When are confidentiality agreements ordered?

An express undertaking as to confidentiality may be ordered where there is evidence that the business in question is involved in a market where it is critical that competitive information be kept confidential, and where the success of the business is dependent on non-disclosure of certain information.[36] In *Turner-Sommer v. Strong*, the husband led evidence that his business was involved in the technological market in which his competitors expect confidentiality and that he was subject to a settlement agreement with a former business partner which included a provision requiring the details (which the wife sought) to be kept confidential. The court was satisfied that "special circumstances" existed which made it reasonable to request an undertaking as to confidentiality from the wife.[37]

An undertaking in writing may also be ordered in family law proceedings where the trust level between the parties has eroded to the point where the disclosing party does not trust the other to maintain the information as confidential without an express agreement to do so in writing. This undertaking may also apply to counsel and any experts.[38] In *Spiring v. Spiring*, a Manitoba Queen's Bench case, the husband sought a sealing order to protect his business interests, and a declaration as to whether the wife was subject to the deemed undertaking rule. The husband established a multimillion dollar investment fund, the ownership of which was held through two trusts. The husband deposed that the disclosure of information relating to the value of the investment fund, including a valuation report previously prepared relating to the sale of shares, could have a "negative economic impact" on the fund and give the competitors an unfair advantage in the market. In this case, the wife refused to agree to keep the information confidential. The court found that the issues did not meet the high threshold for a sealing order, but that the erosion of trust between the parties was so great that the wife, her counsel, and any experts retained by her must undertake not to disclose the information.[39]

The content of the confidentiality agreement may differ depending on the circumstances of the case. In *Spiring* and *Turner-Sommer*, where orders for confidentiality were made, the recipient party was required to sign an undertaking in writing to treat the information as confidential and not to use it for any other purpose. The courts in these cases seem to be reminding the recipient party of the general obligation which exists pursuant to the deemed undertaking rule and to keep information received in the course of litigation confidential.

Where a more fulsome confidentiality agreement is ordered, it is typically because the recipient party has given an undertaking to sign a confidentiality agreement.[40] It is unclear whether in these cases and in the absence of such an undertaking by the recipient party whether the court would have made such an order. The form of the confidentiality agreement in these cases may be agreed upon or ordered to be satisfactory to the disclosing party's counsel.[41] The court may order the parties to return to court to settle the form of the confidentiality agreement in the event of a dispute.[42] If there is such a dispute, counsel who are drafting confidentiality agreements should be as specific as possible. If the confidentiality agreement is too vague, it will not be accepted.[43]

Where an expert requires disclosure to complete a valuation report and is prepared to sign a confidentiality agreement, the court may order that the confidentiality agreement is signed and the unredacted disclosure produced.[44] In *Bailey v. Bailey*, the wife brought a motion for third party disclosure from three corporations in which the husband held an

interest. It was agreed that the disclosure was relevant, but the non-parties opposed the motion on the basis that there were privacy concerns. The wife's valuator swore an affidavit attesting that without the information, or if the information were provided redacted, he would be limited in his ability to fulfil his retainer. The wife's valuator also deposed that the information would remain confidential in his office and that he was willing to sign a confidentiality agreement. The court ordered that a confidentiality agreement should be signed.[45]

A court may order that a confidentiality agreement applies retroactively to all disclosure produced in litigation. In *Lafontaine v. Maxwell*, a motion for third party disclosure regarding the husband's business interests was met with a request for a confidentiality agreement. The court ordered that the provisions of the agreement would apply to all disclosure produced to date, including disclosure produced by the party to the litigation and found that a "blanket" confidentiality agreement would not be more difficult to manage. The court found that "private companies and other private entities, especially non-parties, are generally entitled to expect that information provided during the course of litigation will be treated and handled as confidential".[46] In that case, the wife served an offer to settle attaching a confidentiality agreement which she had offered to sign. The court ordered that the confidentiality agreement must be mutually acceptable and that, if the parties could not agree, each party could submit an agreement and the court would choose one.[47]

The court may order that a party and the party's counsel and expert sign a confidentiality agreement where there is evidence that a party discussed the litigation with third parties, in order to balance the interests of the parties.[48] In *Burton v. Burton*, the wife sought additional disclosure required by her valuator to complete his reports, including disclosure from the husband's business partner and the company itself. The husband opposed the motion on the basis that the requests were disproportionate, irrelevant, and included confidential information, such as names of customers and customer contracts. The company was involved in contracts with the federal government and risked the loss of high-security clients if information was disclosed. The company took the position that confidentiality was a fundamental term of all of its customer and employment contracts. The husband alleged that the wife had discussed the litigation with third parties and in light of this fact, and the nature of the business, the court ordered that a confidentiality agreement be signed.[49]

When is a confidentiality agreement not appropriate?

A confidentiality agreement will not be ordered where the deemed undertaking rule is sufficient or if it is determined that such an agreement may lead to additional litigation: in *Josephson v. Hanna*, Justice Czutrin found that the litigation was so acrimonious that a confidentiality agreement would create additional areas for conflict. The husband claimed documents from one of the companies that had to disclose "…was in a small, extremely 'cutthroat' competitive industry and any divulgence of information could negatively impact the company and its employees". This general, broad description of harm was insufficient. Justice Czutrin started from the presumption that the provisions of the FLR outlined above would be followed and that a party who wished to disclose the evidence/information beyond the scope of the deemed undertaking rule could apply to the court for permission to do so.[50] Justice Czutrin observed that if any of the company's financial information was to be filed at a hearing, the concerned party could bring a motion for a

sealing order — however, as set out above, sealing orders must meet a high threshold.[51]

Summary

To summarize, the deemed undertaking rule may not protect information or documents provided in the course of litigation because any or all of that information may be filed with the court and all protection of confidentiality is lost. Sealing orders are rarely available unless the test in *Sierra Club* is met. If both parties are not in agreement with ADR, the parties are left with little choice but to proceed to court where documents may be filed and confidentiality will be lost.

If a client requires additional protection for information or documents and does not meet the test for a sealing order, a confidentiality agreement may be useful. The parties may agree to the terms of a confidentiality agreement or in some limited circumstances, a confidentiality agreement, or at least an undertaking of confidentiality, may be ordered.

A confidentiality agreement between parties does not guarantee that the confidential information will never be filed with a court. There are clear limits on what protection a confidentiality agreement my offer. Parties may agree, for example, that neither of them will attempt to file confidential documents with the court as a term of their confidentiality agreement. The confidentiality agreement may also require any party wishing to file the documents to first pursue a sealing order. The need to file documents which are covered by the confidentiality agreement could arise, for example, if those documents become necessary for the enforcement of a related separation agreement.

Given the general principle of openness and the fact that the court has oversight to determine whether any part of a court file is sealed, it is possible that the sealing order may be refused even in the face of a clear agreement by the parties. The parties may consent to a sealing order, but this is not determinative. Counsel could argue that, pursuant to the test in *Sierra Club*, there is an interest of public importance in such a case which ought to be protected. If parties agree to keep documents confidential and sign a contract which requires this, it would serve an important public interest to enforce their agreement and to maintain that confidentiality by keeping those specific documents sealed. Otherwise, parties may not be willing to enter into these types of agreements, which often facilitate disclosure and settlement, if they believe that there will be no protection of confidential information at all. The party seeking a sealing order will also have to meet the second part of the *Sierra Club* test and would need to demonstrate the salutary effects of the sealing order outweigh its deleterious effects on the right to information. These types of situations would need to be determined on a case-by-case basis.

Even in such cases where parties need to file documents which they have previously agreed to keep confidential pursuant to a confidentiality agreement, it would still be better to have a confidentiality agreement in place. It acts as a disincentive because it requires the party seeking to file the documents to take an additional step of bringing a motion for a sealing order. It also allows the disclosing party an opportunity to respond to the sealing motion and to, at the very least, receive notice of what is being filed. Further, the disclosing party would have an opportunity to request that the documents that are filed are limited to only what is necessary.

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[1] [2002] S.C.J. No. 42, 2002 SCC 41 at para. 53 [hereinafter "*Sierra Club*"].

[2] *Foulidis v. Foulidis*, [2016] O.J. No. 5592, 2016 ONSC 6732 at para. 16 citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 at para. 13.

[3] *Manchanda v. Thethi*, [2016] O.J. No. 3006, 2016 ONSC 3776 at para. 1.

[4] Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [hereinafter "RCP"]; Family Law Rules, O. Reg. 114/99 [hereinafter "FLR"].

[5] *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2008] S.C.J. No. 8, 2008 SCC 8 at paras. 25-26.

[6] In *C. (S.) v. (S.) N.*, [2017] O.J. No. 206, 2017 ONSC 353 at para. 15 citing *Goodman v. Rossi*, [1995] O.J. No. 1906, 24 O.R. (3d) 359 (C.A.): evidence produced under "compulsion" is considered evidence produced under the discovery process in the RCP. By analogy, the deemed undertaking rule would apply to the disclosure required to be produced by the FLR, but not any additional disclosure produced voluntarily.

[7] *C. (S.) v. (S.) N.*, [2017] O.J. No. 4846, 2017 ONSC 5566 at paras. 21-22.

[8] *Ibid*.

[9] See FLR, r. 20(6).

[10] *Logan v. Harper*, [2004] O.J. No. 4132 at para. 10 (S.C.J.).

[11] *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137(2).

[12] In *Sierra Club*, the court refers to the term "confidentiality order" which is not the same as a confidentiality agreement. The appellant in that case sought an order that certain documents be kept confidential and made available only to the parties which is akin to what is referred to as a sealing order discussed in other cases in this article. The terms confidentiality order and sealing order are used interchangeably in this article.

[13] [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835.

[14] *Sierra Club*, *supra*, note 1, at para. 53.

[15] *M. (G.) v. M. (R.)*, [2015] O.J. No. 3245, 2015 ONSC 4026 at para. 4.

[16] *Foulidis*, *supra*, note 2, at para. 32.

[17] *H. (M.E.) v. Williams*, [2012] O.J. No. 525, 2012 ONCA 35 at para. 30.

[18] *Q. v. S.*, [2016] O.J. No. 6525, 2016 ONSC 7447 at para. 37 citing *Himel v. Greenberg*, [2010] O.J. No. 4623, 2010 ONSC 2325, para. 52.

[19] *Spiring v. Spiring*, [2004] M.J. No. 86, 2004 MBQB 55 at paras. 48-49.

[20] *Ludmer v. Ludmer*, [2010] O.J. No. 6070, 2010 ONSC 6116 at para. 19.

[21] *Himel*, *supra*, note 18, at para. 56.

[22] *Himel*, *ibid*., at para. 58.

[23] R.S.O. 1990, c. C.12 [hereinafter "CLRA"].

[24] See *K. (M.S.) v. T. (L.T.)*, [2002] O.J. No. 4179 (S.C.J.) where the sealing order was denied but this was reversed on appeal in *K. (M.S.) v. T. (L.T.)*, [2003] O.J. No. 352 (C.A.) [hereinafter "*K. (M.S.)*"].

[25] *K. (M.S.)*, *ibid*. at paras. 23-24 (C.A.). (reversed on other grounds).

[26] *Foulidis*, *supra*, note 1, at para. 47.

[27] *G. (C.M.) v. G. (R.)*, [2012] O.J. No. 1884, 2012 O.J. No. 1884 (S.C.J.).

[28] *Foulidis*, *supra*, note 1, at para. 47; see also *Q. v. S.*, *supra*, note 18; *M. (G.) v. M. (R.)*, *supra*, note 15.

[29] CLRA, *supra*, note 23, at s. 70.

[30] *Foulidis*, *supra*, note 2, at para. 21; *S. (W.) v. S. (R.)*, [2010] O.J. No. 5729, 2010 ONSC 6981 at para. 7 where a partial sealing order was granted.

[31] Ontario Superior Court of Justice's publication ban notification system: <http://www.ontariocourts.ca/scj/publication-ban-requests/>.

[32] *Ramsden v. Ramsden*, [2013] B.C.J. No. 1123, 2013 BCSC 949.

[33] See attached examples of types of confidentiality agreements.

[34] *Ludmer v. Ludmer*, *supra*, note 20, at paras. 16-17.

[35] *Q. v. S.*, *supra*, note 18, at para. 37; *Spiring v. Spiring*, [2004] M.J. No. 86, 2004 MBQB 55, at paras. 58-59.

[36] *Turner-Sommer v. Strong*, [1999] O.J. No. 5852, 45 R.F.L. (4th) 444 at paras. 3-5 (C.J.).

[37] *Ibid.*

[38] *Spiring v. Spiring*, *supra*, note 35, at paras. 58-59.

[39] *Ibid.*

[40] See *Q. v. S.*, *supra*, note 18, where Czutrin J. states at para. 7 that the confidentiality agreement may be signed by the mother because she agreed to do it but Rule 20 should be sufficient protection; see also *Ludmer*, *supra*, note 20, at para. 22; *Burton v. Burton*, [2016] O.J. No. 81, 2016 ONSC 62, at paras. 141 and 143; and *Bailey v. Bailey*, [2012] O.J. No. 1801, 2012 ONSC 2486.

[41] *Bailey*, *ibid*., at para. 25.

[42] *Burton*, *supra*, note 40, at para. 144.

[43] See *Josephson v. Hanna*, [2010] O.J. No. 3224, 2010 ONSC 407 at para. 28.

[44] *Bailey*, *supra*, note 40, at paras. 25-26.

[45] *Ibid*.

[46] *Lafontaine v. Maxwell*, [2014] O.J. No. 803, 2014 ONSC 700, at para. 9.

[47] *Ibid.*

[48] *Burton*, *supra*, note 40, at paras. 142-144.

[49] *Ibid.*

[50] *Josephson v. Hanna*, *supra*, note 43, at paras. 27-28, 31.

[51] *Ibid.*

CONFIDENTIALITY AGREEMENTS — EXAMPLES

CONFIDENTIALITY AGREEMENT

BETWEEN:

Party A

AND

Party B

1. Party A and Party B (each a "**party**" and collectively, the "**parties**") were married on __ and separated on ___.
2. The parties entered into mediation to resolve all issues between them arising out of the breakdown of their relationship;
3. The parties fully and finally resolved all issues between them by negotiating and entering into a separation agreement dated September 28, 2018 (the "**Separation Agreement**");
4. In the mediation and in the negotiation of the Separation Agreement Party A disclosed to Party B information and records that included, among other things:
   a. Financial information relating to Company X and more specifically, the following documents:
      i. Financial statements for Company X for the last 5 years;
      ii. Business Valuation for Company X; and
      iii. Previous Offers for Purchase and Sale of Company X.

   (together, the "**Confidential Information**")
5. The parties acknowledge that any disclosure, release or dissemination of the Confidential Information to third parties, or into the public domain, would cause serious irreparable harm to Company X.
6. The parties agree and undertake as follows:

a) NON-DISCLOSURE: To hold the Confidential Information in the strictest confidence, and in particular not to discuss, disclose or authorize the disclosure of the Confidential Information, or any part of it, to any third party, or to the public, except to the extent permitted under this Agreement.

b) EXCEPTIONS: Notwithstanding anything herein to the contrary, neither party (the "**Recipient Party**") shall be liable to the other party (the "**Disclosing Party**") with regard to any Confidential Information, that:

   a. has been disclosed by the Recipient Party to any third party or to the public prior to the date of this Agreement;

b. has entered or hereafter enters the public domain other than by a breach by the Recipient Party of the provisions hereof;

c. is disclosed by the Recipient Party as a result of filing a copy of such Confidential Information with a court of competent jurisdiction in order to enforce the Recipient Party's rights pursuant to the Separation Agreement – in such a case, the party seeking to enforce the agreement shall bring a motion for a sealing order sealing the Confidential Information and shall bear the costs for having to do so, subject to reapportionment by the Court; or

d. is disclosed by the Recipient Party pursuant to the order or requirement of any competent judicial authority, in accordance with section 2 of this Agreement.

2. **LEGAL REQUIREMENT**: If any party becomes required by any competent judicial authority to disclose the Confidentiality Information, or any part of it, such party will:

   a. give prompt notice of such requirement to the other party;

   b. with respect to a court order, serve the Court with a motion at their own expense to seal the document or information that must be disclosed before providing the information;

   c. if no sealing order is available, to disclose only that portion of the Confidentiality Information which is absolutely necessary to ensure compliance with such requirement as agreed to by the parties or by order of the court; and

   d. continue to treat anything that is disclosed pursuant to a legal obligation as confidential under this Agreement.

3. **INJUNCTIVE RELIEF:** Each party acknowledges that any breach of this Agreement by a party would cause irreparable harm to Company X and, therefore, each party shall consent to an injunction and injunctive relief upon any breach of this Agreement, such injunction prohibiting the breaching party from further discussing, disclosing or authorizing the disclosure of any part of the Confidential Information and costs for the party seeking injunctive relief in an amount to be determined by the Court. The rights and remedies provided to each party under this Agreement are cumulative and in addition to any other rights and remedies available to each party at law or in equity.

4. **AMENDMENTS:** This Agreement may be amended only by a written amending agreement executed by the parties. No amendment of or waiver of, or modification of any obligation under this Agreement will be enforceable unless set forth in writing and signed by the parties. Any amendment effected in accordance with this section will be binding upon all parties and their respective representatives, successors and assigns.

5. **WAIVER:** A party's failure to exercise or delay in exercising any right, power or privilege under this Agreement shall not operate as a waiver; nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof.

6. **ENFORCEABILITY:** If any of the provisions of this Agreement are found to be unenforceable, the remainder shall be enforced as fully as possible and the unenforceable provision(s) shall be deemed modified to the limited extent required to permit enforcement of the Agreement as a whole.

7. **ENTIRE AGREEMENT:** This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes any and all prior understandings, arrangements and agreements between the parties hereto, whether oral or written, with respect to the subject matter hereof.
8. **LEGACY EFFECT:** This agreement shall be binding upon the parties, their respective heirs, executors, administrators, successors and assigns.
9. **GOVERNING LAW:** The provision of this Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

Signed on the……. day of……., 2018.

_____	_____
Witness	**Party A**
_____	_____
Witness	**Party B**

CONFIDENTIALITY AGREEMENT

Party A and her solicitor and valuator

and

Party B and his solicitor and valuator

And

Third Party and Company X

1. Party A and Party B were married on __and separated on ___.
2. Party A is an employee at Company X which is owned by Third Party.
3. Third Party is the sole shareholder of Company X and is the father of Party A.
4. Party B seeks financial disclosure from Company X. Party A does not object to Third Party providing the information sought to Party B but also seeks to receive the same information as Party B.
5. Third Party is prepared to provide certain financial disclosure of Company X, as defined below as the "Confidential Information," to Party A and Party B as well as their respective solicitors and valuators (collectively, "The Recipients") only if the disclosure remains confidential.

6. The Recipients acknowledge that the Confidential Information includes proprietary information which could cause harm to Company X if the Confidential Information is released into the public domain and more specifically if the Confidential Information is obtained by Company X's competitors it will likely cause Company X to suffer a financial loss due to its loss of competitiveness.
7. The Third Party and Company X undertake to provide the Confidential Information to the Recipients for the consideration set out in this Agreement, the sufficiency of which is acknowledged and agreed to.

Confidential Information

8. The Third Party shall provide to the Recipients the list of documents set out at Schedule A attached (the "Confidential Information"). The costs of copying the Confidential Information shall be born by Party A.

Terms of Confidentiality

9. The Recipients, and each of them, hereby agree:
   a. to keep all Confidential Information confidential;
   b. to not use any Confidential Information for any purpose other than for the purposes of the matrimonial dispute between Party A and Party B;
   c. the Recipients shall not disclose any Confidential Information to any additional persons or corporations or file same in any court proceeding except by order of the court.
   d. In the event that any of the Recipients need to file the Confidential Information with the court, he/she shall first seek a sealing order, at his/her cost to ensure that the Confidential Information remains confidential. If the Court will not grant a sealing order for the Confidential Information, the party seeking the sealing order shall bring a motion for directions, to determine how the production of the Confidential Information may be limited to only what is necessary to be filed with the Court before any of the Confidential Information is provided.

Signed this ___ day of ___ in Toronto, Ontario.

Party A

Per:

_____ _____

Witness

Signed this ___ day of ___ in Toronto, Ontario.

Solicitor for Party A

Per:

_____ _____

Witness I have authority to bind the firm and all members
of the firm

Signed this ___ day of ___ in Toronto, Ontario.

Valuator for Party A

Per:

_____ _____

Witness I have authority to bind the firm and all members
of the firm

Signed this ___ day of ___ in Toronto, Ontario.

Party B

Per:

_____ _____

Witness

Signed this ___ day of ___ in Toronto, Ontario.

Solicitor for Party B

Per:

_____ _____

Witness I have authority to bind the firm and all members
of the firm

Signed this ___ day of ___ in Toronto, Ontario.

Valuator for Party B

Per:

_____ _____

Witness I have authority to bind the firm and all members
of the firm

Signed this ___ day of ___ in Toronto, Ontario.

Third Party

Per:

_____ _____

Date

Signed this ___ day of ___ in Toronto, Ontario.

Company X

Per:

_____ _____

Date I have authority to bind the corporation

• Paying Fair: How to Uncover Undisclosed Assets or Income through a Lifestyle Analysis •

Ivy Tse

Have you ever had a client say to you, "My ex is hiding a lot of cash in a suitcase in the ceiling of his office that is not reported on his tax return or on any bank statement!"? — It happens more than you think.

An issue which often comes up in family law cases is the allegation that a client's spouse is concealing cash transactions to deliberately underreport earnings and avoid paying income tax. Where the quantum of suspected unreported cash business is significant, it can undermine income calculations for support purposes, as well as the required equalization payment. In this type of situation, an accounting expert can assist in bridging the gap by carrying out a Lifestyle Analysis review. This article discusses the nature of a Lifestyle Analysis, how it is conducted and the potential benefits of performing such a review.

What is a Lifestyle Analysis?

A Lifestyle Analysis can also be referred to as a "source and use" analysis, as it involves a comprehensive review of the spending patterns of a family and/or an individual, taking into account the known *sources* of money coming in and the *uses* thereof over a specified time period. Tracing the flow of funds to originating sources can also identify hidden assets from which unreported income was generated.

A simple example is where a spouse claims annual income of only $100,000, but the family was able to take vacations costing $20,000 per year and afford annual private school fees of $40,000 per year for their children. The money available doesn't add up given other living expense requirements — these types of expenditures may represent cash received from an unreported source from which the spouse is collecting income.

How is a Lifestyle Analysis Performed?

Depending on the specific circumstances of a case, the investigative work undertaken usually involves the following steps:

1. Obtaining an understanding of the family's living standards, the assets owned by each spouse, the debts that need to be serviced and each spouse's earnings and spending patterns prior to and after the marriage breakdown;
2. Selecting an appropriate period of time for purposes of reviewing financial records;
3. Identifying and obtaining the financial records required for review;
4. Conducting a detailed review of the financial records to identify the various sources and uses of the family and/or individual spouse's funds; and,
5. Comparing the results in number 4 above to what the spouse has represented as income available for support purposes, including identifying discrepancies that may suggest unreported income and/or property.

Each of these steps are explained further below.

1. Obtain an understanding of the family's living standards, asset ownership, indebtedness and spending patterns

Conduct a thorough interview with your client to understand the total spending by the family prior to separation, including cash, credit cards and cheques, and all of the known sources of funds. Examples of questions to consider may include the following:

(a) What were the family's spending patterns in the years leading up to the separation (you can use a spending budget to make sure you cover everything)?

(b) Were these spending patterns consistent throughout this period?

(c) At any time during the marriage, were there periods where spending was particularly high or low?

(d) How were the majority of household expenses paid? By credit card/cheque/pre-authorized payments (which would leave a paper trail) or in cash?

(e) Were there loans taken out during the marriage? Were they repaid?

(f) In the event one or both of the spouses are management or shareholders of a business, were personal expenses paid from business accounts that should be considered?

These foundational questions form the basis of the documentation required from your client in order to perform the detailed financial review.

2. Select an appropriate period of time for purposes of reviewing financial records

This should be selected carefully, as a period that is too short may not capture key expenses that may indicate unreported income (*e.g.*, lavish family trips taken once every few years) and a long

period can mean higher costs for professional fees. The period should represent a period of time where household expenses have been fairly consistent and representative of the circumstances experienced prior to separation.

It is helpful to also perform a Lifestyle Analysis for a post-separation period to highlight the differences in spending by the spouse after the separation.

3. Identify the financial records required for review

Once the relevant review period has been established, the basic documents to be requested include the following:

(a) Monthly bank statements, including all personal and joint chequing and savings accounts and copies of cheques.

(b) Monthly personal and joint investment account statements.

(c) Monthly personal and joint credit card statements.

(d) Monthly personal and joint loan/line of credit statements.

(e) Any valuation reports prepared for businesses of which one or both of the spouses are management and/or shareholders. These valuation reports are often prepared for equalization purposes and can provide information regarding what personal expenses, if any, were added back for the period reviewed to calculate the fair market value of a shareholding in a company.

Many of these financial documents (at least the current ones) would have probably already formed part of the disclosure provided in the discovery process.

One of the underlying challenges with a Lifestyle Analysis is the co-operation of both parties in providing the necessary financial documents. Often, separated spouses would already have severed access to each other's financial records. Without a proper paper trail, expenses may be difficult to substantiate. Where records are not available and/or readily obtainable by your client, a court order may be required to request additional documentation from the other spouse, financial institutions and/or suppliers of the goods/services used by the household.

4. Conduct a detailed review of the financial records and identify the sources and uses of the family and/or individual spouse's funds

After all the financial documents have been gathered and provided to the accounting expert, he/she will get down to the nitty-gritty of the analysis by way of reviewing, categorizing and summarizing all the transactions in the data provided. Ensure that the accounting expert has the appropriate resources, experience and knowledge to undertake this tracing exercise, as it involves a review of many detailed transactions and intensive tracing of funds between accounts that are often linked to one another.

Here are some tips that would assist in this exercise:

Use electronic spreadsheets

Electronic spreadsheets (*e.g.*, Microsoft Excel) should be used to compile the data so that the information entered can be easily located and edited in a central database. There are many functions available in spreadsheets that make certain analyses possible with little effort, such as matching up transfers between accounts, graphs that show spending trends over time and sensitivity analyses (*e.g.*, "if expenses go up $X per month,

the effect on income for support purposes would be $Y").

Group income and expenses in categories

It is important to list transactions by date and group them into categories so that large amounts of data can later be summarized in a manner that is easily understood. Categories of cash inflows and outflows may include:

- Inflows: "employment income", "interest from investment income", "transfers from…", *etc*.;
- Outflows: "utilities", "travel", "clothing", "transfers to….", *etc*.; and,
- An "unknown" column is useful in identifying unknown deposits/expenditures for further investigation.

Many monthly credit card statements include summary pages that group monthly spending into categories such as "grocery", "retail", "travel and fuel" which can serve as a quick reference without having to look into the details.

Watch out for inter-account transfers

As suggested above, if a spouse has investment and/or loan accounts, there may be significant transfers of cash between these accounts and his or her day-to-day banking accounts. A careful investigation on significant cash transfer activity can help identify additional investment or bank accounts, as well as hidden property in both local and foreign jurisdictions.

Prepare, and allocate sufficient time and budget, to request for additional information

A deep dive into the details of all the financial records will likely uncover spending patterns requiring further information or explanation from both parties. Unexplained cash deposits and expenses paid by cash for which no paper trail is available will cry out for additional investigation or information that may or may not be easily accessible by your client.

Be sure to allocate sufficient time and financial resources to resolve these issues at the outset of the engagement, so that all parties are cognizant of the detailed level of review required and the professional fees to be incurred.

5. Identify discrepancies suggesting unreported income and/or property

Once the detailed review of all the transactions is at a reasonably completed stage (*i.e*., there may still be some transactions that are unexplained), the accounting expert can identify discrepancies which fall into one or more of the follow scenarios:

- The income reported by the payor spouse was less than the family's total household expenditures for the period under review, which suggests unreported sources of funds/income;
- there were cash inflows from sources not reported on the payor spouse's income tax returns that should be included (and possibly grossed up) in the calculation of income for support purposes; and/or,
- depending on the specific circumstances, sources of unreported income may uncover unreported assets, which will increase available income for support purposes, as well as possibly property subject to equalization.

Conclusion

To summarize, the benefits of a Lifestyle Analysis review include:

1. Developing a detailed financial picture of a family's total expenditures and standard of living prior to and/or after separation.

2. Based on the difference between reported income of the family and total living expenses incurred, identification of possible unreported cash income or other assets;
3. Detecting non-recurring or large expenditures that the family seemingly were able to afford prior to separation; and,
4. Possibly uncovering additional unreported assets subject to equalization on separation.

A Lifestyle Analysis is an extensive financial investigation that requires co-operation and complete documentation disclosure by both spouses. If properly undertaken, this review can present a picture of the standard of living enjoyed by the family, and the resources to support that lifestyle. It can help in calculating income for support purposes in a fair and justified manner as well as assist in identifying additional property of the parties. A Lifestyle Analysis can definitely add value — both in support payments and property settlements.

[**Ivy Tse** practices exclusively in the area of business valuations, forensic accounting and litigation support. She has experience in quantification of economic damages for privately-owned and publicly traded companies, as well as extensive forensic accounting investigations for companies with complex organizational structures. She has also assisted in preparing numerous business valuation reports relating to corporate reorganizations, shareholder disputes and matrimonial disputes, including calculations of income for child and spousal support purposes. Her casework covers a broad range of industries including manufacturing, retail/distribution, information technology, financial services, pharmaceuticals, construction and transportation.]